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No. 08-541

IN THE
SUPREME COURT OF THE UNITED STATES

LEONARDO ZULUAGA-MARTINEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

ROBERT E. JUCEAM
MICHAEL B. DE LEEUW*
JENNIFER L. COLYER
MICHAEL F. SAVICKI
SAMUEL GRONER
JACQUELYN BURKE
Fried, Frank, Harris, Shriver &
Jacobson LLP
One New York Plaza
New York, New York 10004
(212) 859-8000

* *Counsel of Record* *Attorneys for Petitioner*

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The Government's Opposition Brief ("Opp.")[1], sidesteps the fundamental issue presented in the petition: whether the application of the stop-time rule to Mr. Zuluaga-Martinez amounts to impermissible retroactive effect. Indeed, the question presented by the Government ignores the issue of retroactivity entirely. *See* Opp. I. It responds to the petition with an irrelevancy—the form-over-substance argument that Mr. Zuluaga-Martinez cannot even raise the question of retroactivity because he ultimately applied for cancellation of removal under INA § 240A rather than applying for a discretionary waiver under § 212(c), a remedy repealed only *after* his required period of lawful presence would have been satisfied but for the retroactivity analysis. *See* Opp. 10-11; 12-13.

Indisputably, the retroactive application of the stop-time rule attached "new legal consequences to events completed before its enactment." *See INS v. St. Cyr*, 533 U.S. 289, 321 (2001). Under the lower court's retroactively analysis, in 1997, two years after the seven-year period between May 1988 and May 1995 expired, the stop-time rule came into effect and retroactively cut short the required seven year period as of April 1995—one month before its attainment. The change of circumstances is clear: but for the retroactive application of the stop-time rule, Mr. Zuluaga-Martinez would have been eligible to apply for a waiver of deportation under INA § 212(c), a waiver provision that was then provided by law. The application of IIRIRA, through the retroactive application of the stop-time rule by the

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[1] All capitalized terms have the same meaning as set forth in the opening petition ("Pet.").

court below, stripped Mr. Zuluaga-Martinez of his claim to § 212(c) eligibility, resulting in changed legal circumstances and an impermissible retroactive effect.

While the Government concedes, as it must, that the circuit courts are conflicted as to whether reliance is a necessary element of retroactivity analysis, *see* Opp. 16-17, it argues that this split is irrelevant here. This argument, however, does not address Petitioner's point that the Second Circuit has ignored this Court's decisions by imposing on litigants the burden of proving that they would have been harmed by the statute under all conceivable hypothetical scenarios, and that they subjectively and actually relied upon the prior law. *See* Pet. 19-20; 21-30. The Court should address this issue now to resolve the split among the circuits on the necessity of reliance and to correct the trend among the circuits as they veer ever further away from the flexible retroactivity framework that this Court has repeatedly adopted and applied.

ARGUMENT

I. Application of the Stop-Time Rule to Mr. Zuluaga-Martinez Would Have an Impermissible Retroactive Effect

Instead of addressing the issue raised by this petition head-on, the Government argues disjointedly that the Court should avoid consideration of Mr. Zuluaga-Martinez's petition: (a) because Mr. Zuluaga-Martinez's application was under § 240A rather than § 212(c), *see* Opp. 10-11, 12-13; (b) because the Ninth Circuit (in a completely different factual scenario, as explained below)

allegedly reached a similar result to the one reached by the Second Circuit here, *see* Opp. 13-14; and (c) because the Second Circuit's decision purportedly did not rest on a counter-factual analysis after all, *see* Opp. 11. Each of these arguments is addressed in turn below, but the fact that the Government has chosen to focus on these ancillary issues should not shift the Court's attention away from the key issue: whether the Second Circuit's majority decision conflicts with this Court's prior retroactivity decisions.

a. It is Immaterial that Mr. Zuluaga-Martinez Applied for Cancellation of Removal Under § 240A Rather than a Discretionary Waiver of Deportation Under the Repealed § 212(c)

The Government argues that because Mr. Zuluaga-Martinez applied for § 240A relief, rather than for relief under the then-already-repealed § 212(c), he somehow lost the opportunity to argue that § 240A's stop-time rule—as applied to him—is impermissibly retroactive. *See* Opp. 12-13. The Government cites no authority supporting this argument,[2] which turns this Court's retroactivity

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[2] In fact, in a case repeatedly cited by the Government and described as "the only other court of appeals decision to address circumstances similar to petitioner's," *see* Opp. 13, the Ninth Circuit (like the Second Circuit here) implicitly *rejected* the Government's position by considering the very argument the Government claims is unavailable in this case—that the stop-time rule is impermissibly retroactive—even though there too the petitioner had applied for cancellation of removal under § 240A rather than a discretionary waiver of deportation under

rules on their head. As noted by the Government, "[t]he legal effect of conduct should ordinarily be assessed under the law that existed *when the conduct took place*." *See* Opp. 11 (emphasis in original) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)). The fact that the Government waited until after the passage of IIRIRA to initiate removal proceedings in a particular case, making § 240A rather than § 212(c) the applicable statute for application for relief, does not make the retroactive application of IIRIRA to certain pre-IIRIRA conduct any more permissible.[3] The "special concerns" raised by retroactive statutes like IIRIRA, *see St. Cyr*, 533 U.S. at 315, are not diminished based on whether the relief is called "cancellation of removal" or "waiver of deportation" or by where in the United States Code the relevant statutory relief is found. What matters is that the statute to be retroactively applied "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321.

Critically, in May 1995, Mr. Zuluaga-Martinez became eligible to apply for a waiver of deportation under § 212(c) should he have needed one. He would have been able to seek such relief but for the lower court's application of the stop-time rule. The fact

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the repealed § 212(c). *See Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1322-23 (9th Cir. 2006).

[3] The Government seems to be saying that because 212(c) was repealed, Congress necessarily intended IIRIRA to have full retroactive effect, including its stop-time rule. Of course, that is not the case. The repeal of a prior statute is not shorthand for the requirement that retroactive effect be explicitly stated. *See Landgraf*, 511 U.S. at 263; *St. Cyr*, 533 U.S. at 314-320.

that Mr. Zuluaga-Martinez was never in the position to actually apply for § 212(c) relief—because the Government did not initiate removal proceedings before the repeal of § 212(c)—is not a basis on which to predicate forfeiture of the right he clearly possessed in May 1995 to seek such relief.

b. The Ninth Circuit in *Valencia-Alvarez* Explicitly Ruled That Aliens Like Mr. Zuluaga-Martinez Were Eligible for § 212(c) Relief Before the Passage of IIRIRA

The Government next argues that a Ninth Circuit decision that addressed "circumstances similar to petitioner's" and denied that alien's petition supports the result reached by the Second Circuit here. *See* Opp. 13-14 (citing *Valencia-Alvarez*, 469 F.3d at 1327-30). The opposite is true.

At issue in *Valencia-Alvarez* was whether an alien's seven-year clock, which started running in 1991, was subject to IIRIRA's stop-time rule. *Valencia-Alvarez*, 469 F.3d at 1321. The court ruled that, because seven years had not elapsed by the time IIRIRA was implemented in 1997, the petitioner had never been eligible for § 212(c) relief. *Id.* at 1330. The Ninth Circuit explicitly contrasted Valencia-Alvarez with other aliens—such as Mr. Zuluaga-Martinez—who had already completed seven years of continuous lawful presence in the United States *before* the passage of IIRIRA: "Thus, in *Generi*[4] and *Henry*,[5] the aliens *were eligible for*

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4 *Generi v. Ashcroft*, No. 4:03-cv-15, 2004 WL 771138 (W.D. Mich. April 13, 2004) (unpublished) (available at Pet. App. A-88).

discretionary relief when IIRIRA became effective, thus distinguishing them from Valencia-Alvarez who has never been eligible for discretionary relief." *Id.* at 1330 (emphasis added). Far from supporting the Second Circuit's decision here, the Ninth Circuit in *Valencia-Alvarez* acknowledged that aliens like Mr. Zuluaga-Martinez *were* eligible for § 212(c) relief because they possessed "an existing right before the retroactive application of § 1229b(d)(1) [§ 240A's stop-time rule] is implicated." *Id.*

c. The Second Circuit's Decision Depended Upon a Hypothetical, Counterfactual Analysis

The majority in the Second Circuit determined that "the relevant date of the determinative event [was] the commission of the drug offense on April 9, 1995," *see* Opp. 11, only because "*if* petitioner had been captured and successfully prosecuted ... and the INS had obtained a deportation order promptly after he committed the offense, he *could have* been deported without the possibility of relief because he *would not, at that time, have* accrued the seven years required by the repealed INA § 212(c)." *See Martinez v. I.N.S.*, 523 F.3d 365, 373-74 (2d Cir. 2008) (emphasis added). The Second Circuit thus explicitly grounded its decision in this hypothetical (and unlikely) chain of events, which all would have had to have occurred within one month—Mr. Zuluaga-Martinez purportedly was never eligible for § 212(c) relief because he *theoretically could have* been prosecuted, convicted, ordered deported, and deported prior to accruing seven years of continuous

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[5] *Henry v. Ashcroft*, 175 F. Supp. 2d 688 (S.D.N.Y. 2001).

residence. *See Martinez*, 523 F.3d at 378 (Straub, J., concurring) ("The majority hinges its decision on [an] unlikely hypothetical possibility"). This sort of counterfactual analysis is inconsistent with this Court's, or any court's, retroactivity decisions. *See* Pet. 19-20 & n. 3-4. But for the majority's use of this hypothetical counterfactual argument, the Second Circuit would have had no choice but to rule that retroactive application of the stop-time rule to Mr. Zuluaga-Martinez is impermissibly retroactive.

II. Reliance Is Not a Necessary Element of Retroactivity Analysis

This Court has repeatedly emphasized the fluidity of retroactivity analysis and that no one factor is dispositive. *See* Pet. 24. The Government acknowledges that "reasonable reliance" is only one of the many factors to be considered, *see* Opp. 15-16, yet, in trying to justify the retroactive application of the stop-time rule to Mr. Zuluaga-Martinez, it fails to discuss any other factor. *See* Opp. 16. When the other factors explicitly mentioned by this Court and acknowledged by the Government as essential to any retroactivity analysis—fair notice and settled expectations—are taken into account, it becomes clear that the only "commonsense, functional judgment" in this case is that the stop-time rule has attached "new legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321. The notice given to Mr. Zuluaga-Martinez regarding the effect of the stop-time rule was unfair. He was not made aware of the effect of his April 1995 offense on continuous presence calculations until over a year later, and his settled expectations were disrupted because he would have continued to

have been entitled to discretionary relief under § 212(c) but for the retroactive application of IIRIRA's stop-time rule by the majority below.

a. The Second Circuit's Retroactivity Analysis Indeed Required Actual, Subjective Reliance

The Government adopts *ipse dixit* that the Second Circuit was not making reliance the *sine qua non* of retroactivity here. *See* Opp. 14-15 ("The court of appeals, however, specifically rejected that characterization of its holding .... That alone suffices to make further review of this question unwarranted in this case."). However, it is the substance of the decision rather than the majority's self-characterization of it that is subject to this Court's review. *See generally Kircher v. Putnam Funds Trust*, 547 U.S. 633, 649 (2006) (Scalia, J., concurring) ("appellate review is exactly what is involved in looking behind the face of an order to determine its *true* basis") (emphasis in original).

The majority below characterized its decision as based upon a lack of "changed consequences" rather than based upon a lack of actual reliance, but then proceeded to determine that no consequences for Mr. Zuluaga-Martinez had changed because he had not actually relied upon the repealed statute. *See* Pet. 25-27. This gambit did not fool Judge Straub, and should not fool this Court. The retroactive elimination of Mr. Zuluaga-Martinez's eligibility to apply for a waiver of deportation based on a crime committed before the new law was enacted constitutes a change in legal consequences under any reasonable understanding of that concept. *See* Pet. 26-27.

b. Whether Reliance Is a Necessary Element of Retroactivity Analysis Is an Important Federal Question with Constitutional Dimensions

The Government insists that Petitioner has failed to grasp "the importance of comparing cases involving the same statutory provisions," and that the acknowledged circuit split regarding the role of reliance in retroactivity analysis is irrelevant because some of those cases involved a different statute, or different parts of the same statute. *See* Opp. 16-17 & n.4. But *Landgraf* and *St. Cyr*'s holdings regarding the contours of the retroactivity inquiry are not grounded in the interpretation of any one particular statute, but rather are constitutionally rooted. The issues at stake here are matters of constitutional importance of the first order; as the Court explained in *Landgraf*, "the presumption against retroactive legislation is deeply rooted in our jurisprudence .... Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." 511 U.S. at 265. If reliance is a *necessary* part of this Court's retroactivity analysis, then reliance must be present before *any* statute is determined to be impermissibly retroactive; if it is not a necessary element, then *no* statute can be rendered permissibly retroactive just because of a lack of reliance.

There is no dispute that the latter possibility is the correct one; the Government itself acknowledges that reliance is just one of many factors that courts take into account in making the

"commonsense, functional judgment" as to whether the statute is impermissibly retroactive. *See* Opp. 9, 15-16. Therefore, because Mr. Zuluaga-Martinez's had a settled expectation in May 1995 that he was eligible to apply for a waiver of deportation, it would violate elementary considerations of fairness to wind back the seven year clock to April 1995 and force Mr. Zuluaga-Martinez to be subject to a rule about which he could not possibly have known in 1995.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Court grant the writ of *certiorari* and review this case.

Respectfully Submitted,

Robert E. Juceam
Michael B. de Leeuw
Jennifer L. Colyer
Michael F. Savicki
Samuel Groner
Jacquelyn Burke

Fried, Frank, Harris,
Shriver & Jacobson LLP
One New York Plaza
New York, New York
10004
(212) 859-8000

Attorneys for Petitioner